REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appli 185 & 186 of 2009

KENYA ANTI-CORRUPTION COMMISSION …….....…… APPLICANT

AND

BHANGRA LIMITED

SAMMY SILAS KOMEN MWAITA …….....……. RESPONDENTS

(Application for injunction and stay of execution pending the hearing and determination

of the Appeal from the ruling and order of the High Court of Kenya at

mbasa (Sergon J.) dated 19th February, 2008 in H.C.C.C. NO. 201 OF 2007)

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CONSOLIDATED

Civil Application Nai 186 of 2009 (UR. 127/2009)

BETWEEN

KENYA ANTI-CORRUPTION COMMISSION ……..…..…… APPLICANT

AND

BHANGRA LIMITED

SAMMY SILAS KOMEN MWAITA ……..……..…….……. RESPONDENTS

RULING OF THE COURT

This ruling relates the two applications – viz, *Civil Application No. Nai. 185 of 2009* and *No. Nai. 186 of 2009*. The parties in the two applications are the same. The orders sought in the two applications are also the same. The only difference between the two applications is that *Civil Application No. Nai. 185 of 2009* relates to plot No. Mombasa Island/Block XI/936, whereas *Civil Application No. Nai. 186 of 2009* relates to plot No. Mombasa Island/Block XI/ 937. The two plots were allotted to **BHANGRA LIMITED**, the 1st respondent in both applications by **Sammy Silas Komen Mwaita**, the 2nd respondent in both applications who was at the material time the Commissioner of Lands. A third plot No. Mombasa Island/Block XI/939 was also allotted to 1st respondent by Wilson Gachanja, a former Commissioner of

Lands.

In *Civil Application No. Nai. 185 of 2006* brought under **Rule 5 (2) (b)** of the Court of Appeal Rules, the applicant – Kenya Anti – Corruption Commission (KACC) seeks two main orders, namely, firstly, an order of injunction to restrain Bangra Ltd, the 1st respondent, its servants or agents from:

"**Taking possession or developing or in any other way dealing with all that parcel of land known as Mombasa Island/Block XI/936 pending the hearing and final determination of the appeal"** (i.e. Civil Appeal No. 112 of 2008).

and secondly,

"**A stay of further proceedings in Mombasa H.C.C.C. No. 201 of 2007 pending the hearing and final determination of …… Civil Appeal No. 112 of 2008".**

In *Civil Application No. Nai. 186 of 2009*, the applicant seeks an order of injunction against the 1st respondent in the same terms but in respect to plot No. Mombasa Island/Block XI/937 and a stay of proceedings in the same terms relating to *H.C.C.C. No. 202 of 2007* pending determination of *Civil Appeal No. 113 of 2008*.

The applicant is a body corporate established under **Section 6 (1)** of the **Ant – Corruption and Economic Crimes Act, 2003** – *Act No. 3 of 2003* and some of its functions as stipulated in **Section 7 (1) (h)** are:

"**to investigate the extent of liability for loss of or damage to any public property and –**

(i) To institute civil proceedings against any person for recovery of such property or for compensation.

(ii) ……..".

By **Section 7 (2),** a matter can be investigated by the applicant at the request of the National Assembly, the Minister responsible for integrity issues or the Attorney General or on receipt of a complaint or on its own initiative.

On or about 22nd August, 2007, the applicant filed two suits in the High Court Mombasa viz, *H.C.C.C. No. 201 of 2007* and *No. 202 of 2007* against the two respondents to recover plots Nos. Mombasa Island/Block XI/936 and 937 respectively which allegedly were illegally excised from Tom Mboya Avenue road reserve, Tudor, Mombasa and unlawfully allocated by the 2nd respondent to the 1st respondent. The applicant further filed a third suit *H.C.C.C. No. 204 of 2007* against Bangra Ltd. as 1st defendant; Wilson Gachanga, a former Commissioner of Lands as 2nd defendant and Barclays Bank of Kenya Ltd to recover plot No. Mombasa Island/Block XI/939 alleged to have been excised illegally from the same road reserve and unlawfully allocated to the 1st respondent and charged to Barclays Bank to secure a loan of Shs.5,000,000/=.

The applicant subsequently filed applications for interlocutory injunction in each of the three suits to restrain the respondents from, inter alia, selling, leasing, sub-dividing, transferring or dealing with each of the three suit plots pending the determination of the respective suits.

The three suits and the three interlocutory applications were based on the following allegations, amongst others.

Tom Mboya Avenue, formerly Tudor road, is an unclassified public road under the maintenance of Mombasa City Council. By a Gazette Notice No. 1099 and dated 25th February 1994, Mutuma Angaine, the Ag. Town Clerk, Mombasa published a proposal to close the road reserve adjacent to plot numbers

160, 572 and 573 and invited objections. There was however no council resolution and ministerial consent authorizing the closure of the road. Subsequently, a Development plan was prepared which created some plots on the road reserve. By letters of allotment dated 9th December, 1996, the 1st respondent was allotted three of the unsurveyed plots by the Commissioner of Lands. The plots were later surveyed and the 1st respondent was granted a lease of each plots Nos. 936, 937 dated 27th January, 2003 and registered on 13th February, 2003 for 99 years from 1st December, 1996 by the Commissioner of Lands. The 1st respondent was also granted a similar lease for plot No. 939 dated 30th May, 1997 and registered on 11th June, 1997. The respective certificates of lease under the Registered Lands Act were issued to the 1st respondent.

The applicant averred in the pleadings that the land being a road reserve was not available for alienation; that the 2nd respondent had no statutory power to grant a lease; that the road has not been closed or its use changed in accordance with the law; that the leases were fraudulently and illegally granted and are null and void. The reliefs sought in the respective plaints include a declaration that the respective leases were issued *ultra vires* the 2nd respondents statutory powers and are thus illegal, null and void; cancellation of the leases; rectification of the register and a permanent injunction against the 1st respondent restraining it from, among other things, trespassing and dealing with the plots.

The application for interlocutory injunction in *H.C.C.C. No. 201 of 2007* relating to plot 936 was heard by the superior court first. However, after the close of the submissions the respective counsel for the parties agreed and the court ordered, that, the decision in *H.C.C.C. No. 201 of 2007* should also apply to *H.C.C.C. No. 202 of 2007*. Further, in respect of the interlocutory application in *H.C.C.C. No. 204 of 2007* the respective counsel adopted their submissions in *H.C.C.C. No. 201 of 2007*.

At the hearing of the applications for interlocutory injunction in the superior court the applicant's counsel contended, among other things, that by **Section 3** of the Government Lands Act, the President has power only to grant interest in an unalienated Government land; that the President had no power to grant an interest in a road reserve; that the procedure stipulated in **Section 185** of the Local Government Act before closure of road was not followed; that by **Section 192** of the Local Government Act, the ownership of a road or road reserve cannot be transferred for private use and that the Commissioner of Lands had no power to grant the leases.

Both respondents filed defences to the suits. The respondent also filed replying affidavits to the interlocutory applications sworn by Ashok Labshanker Doshi – a Director. The 1st respondent averred by way of defence, inter alia, that, the suit was incompetent for, among other things, failing to join the Commissioner of Lands as a party; that 1st respondent is an innocent lessee for value without notice of the alleged irregularities and its rights are not liable to be defeated; that the suit lands were allocated by the Government and not by the 2nd respondent; that 1st respondent did not know and was not obliged to find out whether the suit lands were excised from a road reserve; that 1st respondent complied with conditions of leases and paid all the required payments and that the 1st respondent did not acquire the leases fraudulently. These issues, amongst others, were raised by the 1st respondent's counsel on his submissions in the superior court in reply to the interlocutory application. The 2nd respondent's advocate did not attend the hearing of the interlocutory applications.

The superior court in a composite ruling dated 19th February, 2008 dismissed all the three applications. This is why we have prepared a consolidated ruling in respect of the two applications. Needless to say, the applicant has not filed any application in this Court in respect of the dismissal of the application for interlocutory injunction in *H.C.C.C. No. 204 of 2007*.

The superior court considered the principles for granting interlocutory injunction as espoused in **Giella vs. Cassman & Co. Ltd.** [1973] EA 358 and ruled that the applicant had not established a prima facie case with a possibility of success solely on the ground that the suit was a non-starter as the Commissioner of Lands had not been joined as a party to the suit. On this issue, the Court said:

"**It is clear from paragraph 3 of the plaint that the 2nd defendant was sued in his own personal capacity and not in his former capacity as the Commissioner of Lands.**

The suit against him cannot by a stretch of imagination be equated to a suit against the Commissioner of Lands.

Again in the absence of inclusion of the Commissioner of Lands as a party to this suit, this suit will be a non-starter".

The superior court dismissed the applications for a further reason, namely, that the applicant had not shown that it would suffer irreparable loss as anticipated damages can be easily ascertained. On this aspect of the application, the Court said in part:

"**In this case, KACC laments that it has been unable to trace the file relating to the suit premises, hence it has not been able to register even the prohibitory orders. It says that the property may change hands, hence making the case nugatory. I notice that the 1st defendant has stated the amount it paid the Government to acquire the suit premises. There is also a prayer for damages against the 2nd defendant in the circumstances of this case and for above undisputed facts, I find that the anticipated damage can easily be ascertained. Consequently the order is denied".**

Sometime in June, 2008, the applicant filed three appeals in this Court against the ruling of the superior court to wit, *Civil Appeal No. 112 of 2008* – against the ruling in *H.C.C.C. No. 201 of 2007*; *Civil Appeal No. 113 of 2008* against the ruling in *H.C.C.C. No. 202 of 2007* and *Civil Appeal No. 115 of 2008* which is against the ruling in *H.C.C.C. No. 204 of 2007*.

The two applications have been brought against the above background.

The principles governing the applications for stay of execution, injunctions and stay of proceedings under **Rule 5 (2) (b)** of the Court of Appeal rules require no repetition. The applicant in this case is required to satisfy us both that the two pending appeals are not frivolous and further that unless the orders of injunction and stay of proceedings are granted the appeals, if successful, would be rendered nugatory.

Ms. Bor, learned counsel for the applicants relied on the supporting affidavit of Nzioki wa Makau and the documents annexed to the application to support the applications. She addressed the Court at length in support of the application and submitted, inter alia, that the survey plan on the basis of which the leases in question were issued was later cancelled; that the superior court made final findings of facts and law at an interlocutory stage; that the first respondent has already filed applications to strike out the suits in the superior court on the basis of the findings by the superior court that the suits are non-starter; that alienation of the land pending appeal will change the substratum of the suits and that if the plots are developed, members of the public would be denied the use of the road.

Mr. Okongo, learned counsel for the 1st respondent, on the other hand, submitted that the appeals are not arguable and relied on the replying affidavit of Ashok Labshanker Doshi. He submitted that although the suit lands were originally a road reserve, the road was closed and converted into land and lawfully allocated to the first respondent by the Government.

Although both counsel have addressed us at length on the legality or otherwise of the allocation of the two plots to the first respondent, we appreciate that the superior court has not pronounced on the legality of the allocations or otherwise of the two plots before us. We further, appreciate that the pending appeals are against the findings of the superior court in applications for interlocutory injunction and against the dismissal of the applications. The grounds of appeal state in essence, among other things, that the trial Judge erred in making conclusive findings of facts and law that the Commissioner of Lands had not been joined in the suit; that the leases were issued by the President on behalf of the Government; that under **Section 39** of the Registered Land Act, a purchaser for valuable consideration (like the 1st respondent) was not required to make inquiries or ascertain the circumstances in or the consideration for which that

proprietor was registered; that the suits will be a non-starter in the absence of inclusion of the Commissioner of Lands as a party.

Lastly, we appreciate that the appeal is against the exercise of the judicial discretion while exercising equitable jurisdiction and that a court of appeal does not normally interfere with the exercise of discretion by a trial court unless it is shown that the discretion was not judicially exercised.

We have considered the ruling of the superior court, the grounds of appeal, the affidavits filed in this application and submissions of respective counsel and we are satisfied, with respect, that the two appeals are not frivolous.

The litigation is for recovery of public land which was excised from a road reserve and allegedly allocated illegally to the first respondent. It is the applicant's case that although the Mombasa Municipal Council gave notice of intention to close the road from which the plots in dispute were excised, the road was not infact closed due to public outcry and that the two plots have not been developed. The first respondent's case is that it has already built a perimeter fence and the development of the plot will not affect the use of the road by public. The applicant has exhibited a letter dated 27th March, 2007 addressed to it by the Permanent Secretary, Ministry of Roads and Public Works verifying the encroachment of the road, the effect of such encroachment and recommending to the applicant to initiate action for the recovery. The Permanent Secretary enumerates three effects of the encroachment, namely, road aesthetics are greatly affected; people have to walk on the carriageway, thus, affecting their safety, and, thirdly, lateral sight distances are greatly reduced especially at curves, thus, increasing danger to motorists and pedestrians. There is also a notice dated 9th September, 2008 from the Town Clerk to the first respondent stopping the first respondent from further development of the plots until the dispute is resolved by the Court. The applicant seeks to recover the disputed plots for the interest of the public. The purpose of injunction pending appeal is to preserve the subject matter of litigation pending the determination of the appeal.

In the light of the foregoing, we are convinced that unless the plots are preserved, the appeals, if successful, would be rendered nugatory and the public will suffer substantial loss. In our view, it is just and equitable to preserve the disputed plots pending appeal.

It is apparent that the superior court made several conclusive findings of both law and fact at an interlocutory stage which may prejudice the pending suits. The finding by the superior court that the non-joinder of the Commissioner of Lands renders the suits a "*non-starter"*, that is to say, incompetent, is definitely prejudicial to the pending suits. Further, the applicant contends that the first respondent has filed in the superior court applications to strike out the suit on the basis of that finding by the superior court. By the pending appeals, the applicant, *inter alia*, seeks the reversal of the findings of the superior court. The application for stay of proceedings in the superior court, is in our view, justified.

In the result, we allow each of the two applications and grant orders of injunction and stay of proceedings in each application in the terms prayed pending the hearing and determination of the respective appeals. The costs of each application shall be costs in the respective appeals.

Dated and delivered at Nairobi this 9th day of October, 2009.

E. O. O'KUBASU

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JDUGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI

……**……..**

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR